JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

Perwira Bintang Holdings Sdn Bhd v Kerajaan Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D-24NCC(ARB)-8–02 OF 2013
MARY LIM J
2 AUGUST 2013

Arbitration — Award — Setting aside — Application to set aside — Award dealing with matter not contemplated by parties and not falling within terms of submission to arbitration — Principles for exercise of court's discretion to intervene — Whether final award offended principles of natural justice — Whether award perverse and required intervention of court — Arbitration Act 2005 s 37(1)(a)(iv), (2)(b) & (3)

Arbitration — Final award — Question of law — Plaintiff seeking court's determination of questions of law arising out of final award — Award dealing with matter not contemplated by parties and not falling within terms of submission to arbitration — Principles for exercise of court's discretion to intervene — Whether award perverse or not countenanced by law — Arbitration Act 2005 s 42

The defendant had appointed the plaintiff to carry out a construction project on a design and build arrangement. In the course of carrying out piling works, the plaintiff encountered hard material and rock layer. Additional soil investigation and an expert's report which confirmed the presence of hard material/rock was procured. The defendant was informed of this. The plaintiff completed the piling works and submitted a claim for additional costs for excavation through hard material/rock over and above the normal drilling in soil which additional costs amounted to RM4,052,756. The defendant rejected the claim taking the position that the plaintiff itself was responsible for these extra costs. Hence, the matter was referred to arbitration. After hearing the parties, the following issues were identified as being in dispute (a) what is 'hard rock' for the purposes of the contract; (b) was hard rock encountered during the bored piling works; (c) if yes, whether extra-over payment is due for boring through hard rock; and (d) if yes, at what rate. The arbitrator then found that whilst the claimant was entitled to claim extra-over claims in respect of boring through hard rock during piling works, nevertheless extra-over payment was not due for boring through hard rock as the claimant had failed to prove the quantum of hard rock that was bored during piling works. Thus, the plaintiff's claim was dismissed. Being dissatisfied, the plaintiff challenged the award under ss 37 and 42 of the Arbitration Act 2005 ('the Act'). According to the plaintiff, there was nothing to put the plaintiff on notice or to alert the

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

plaintiff that the length or quantity of hard rock would be an issue. There was no dispute contemplated with regard to the quantity/length of piling for which extra-over claim was payable. The only dispute maintained by the defendant concerned the rate at which the extra-over was to be calculated. The plaintiff invoked the court's jurisdiction under s 37(1)(a)(iv), 37(2)(b) and 37(3) of the Act to set aside certain paragraphs of the award. Alternatively, the plaintiff sought to set aside the award pursuant to s 42 of the Act based on, inter alia, the question of law whether an arbitrator can assign a ground for rejection of the plaintiff's extra-over claim for boring through 'hard rock' ie failure to prove quantity of hard rock when this ground for rejection was never advanced nor contemplated by the defendant at the time of rejection of the claim.

Held, allowing the claim with costs:

(1) From the terms of s 37(1) which uses the word 'may' as opposed to the word 'shall', it is evident that the court is vested with discretion to intervene. This discretion must be exercised judiciously guided by best practices under the Model Law regime and subject to any specific requirements of the Act. Under s 37(1)(a)(iv), the discretion ought to be exercised only if it is proved to the court the matters complained of. The standard is on a civil balance of probabilities (see paras 62–63).

(2) The parties had defined the dispute and the arbitrator had then clarified the issues with the parties. The dispute and the issues were those already mentioned. The arbitrator's statement that ... Although the respondent does not dispute the lengths shown in these piling records, it does dispute that hard rock was encountered while boring'; was actually a radical departure from the dispute that was submitted for arbitration and a contradiction of the position adopted by the defendant as reflected in the pleadings. At no time was this aspect of quantum, that is, the quantity or length of hard rock that was bored ever an issue or a dispute between the parties (see paras 73–75).

(3) The learned arbitrator's decision to reject the plaintiff's claim because the plaintiff had failed to prove the length or otherwise of hard rock which 'consists of rock with uniaxial compressive strength values in excess of 50MPa'; rendered the award one which dealt with a dispute which was not only not contemplated by or not falling within the terms of submission to arbitration; but was never in the contemplation of the parties to start with. The decision of the learned arbitrator, with respect was almost perverse and required intervention of the court (see paras 79 & 81).

(4) Section 42 allows the reference to court only of questions of law. When dealing with applications of this nature, the questions of law which are

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

framed must arise from the award itself and not from the arbitration or arbitration proceedings. Such questions must also be questions of law and not of fact (see para 93).

(5) Arbitrators remain the sole determiners of fact and while their findings and their applications of legal principles may be wrong, the court will not intervene so long as such findings and decisions are not perverse. Where it is perverse or not countenanced by law, the court cannot sit back under the excuse of minimum court intervention (see para 94).

[Bahasa Malaysia summary

Defendan telah melantik plaintif untuk menjalankan projek pembangunan bagi perancangan rekaan dan bangunan. Dalam menjalankan kerja-kerja cerucuk, plaintif menjumpai material keras dan lapisan batu. Siasatan tanah tambahan dan laporan pakar yang mengesahkan kehadiran material keras/batu diperolehi. Defendan dimaklumkan tentang ini. Plaintif menyempurnakan kerja-kerja cerucuk dan mengemukakan tuntutan bagi kos tambahan untuk penggalian melalui material keras/batu mengatasi penggerudian tanah normal yang mana kos tambahan berjumlah RM4,052,756. Defendan menolak tuntutan dengan menghujahkan bahawa plaintif sendiri bertanggungjawab bagi kos tambahan. Oleh itu, perkara tersebut dirujuk kepada timbang tara. Selepas membicarakan pihak-pihak, isu-isu berikut dikenal pasti sebagai dipertikaikan (a) apakah batu keras dalam maksud kontrak; (b) adakah batu keras dijumpai semasa kerja-kerja cerucuk dijalankan; (c) jika ya, sama ada bayaran tambahan lebih diperlukan kerana menggali melepasi batu keras; dan (d) jika nilai, pada kadar berapa. Penimbang tara kemudian mendapati bahawa walaupun pihak yang menuntut berhak untuk menuntut tuntutan tambahan lebih bagi menggali melepasi batu keras semasa kerja-kerja cerucuk, bayaran tambahan lebih walau bagaimapun tidak terhutang kerana melepasi batu keras kerana pihak yang menuntut gagal untuk membuktikan kuantum bagi batu keras yang didapati semasa kerja-kerja cerucuk. Oleh itu, tuntutan plaintif ditolak. Tidak berpuas hati, plaintif mencabar award di bawah ss 37 dan 42 Akta Timbang Tara 2005 ('Akta'). Menurut plaintif, tiada apa-apa untuk memberi notis atau memaklumkan plaintif bahawa ukuran atau kuantiti batu keras akan menjadi isu. Tiada pertikaian yang dipertimbangkan berkenaan kuantiti/panjang cerucuk yang mana tuntutan tambahan lebih perlu dibayar. Satu-satunya pertikaian yang dikemukakan oleh defendan berkenaan kadar pada mana tambahan lebih perlu dikira. Plaintif membangkitkan bidang kuasa mahkamah di bawah s 37(1)(a)(iv), 37(2)(b) dan 37(3) Akta untuk mengenepikan beberapa perenggan award. Secara alternatifnya, plaintif memohon untuk mengenepikan beberapa perenggan award. Secara alternatifnya, plaintif memohon untuk mengetepikan award di bawah s 42 Akta berasaskan, antara lain, persoalan undang-undang sama ada seorang penimbang tara boleh menetapkan asas bagi penolakan bagi tuntutan bayaran lebih plaintif kerana menggali melepasi 'batu keras' iaitu gagal untuk

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

membuktikan kuantiti batu keras sedangkan alasan bagi penolakan ini tidak pernah diketengahkan mahupun dipertimbangkan oleh defendan semasa penolakan tuntutan tersebut.

Diputuskan, menolak tuntutan dengan kos:

(1) Berdasarkan terma s 37(1) yang menggunakan perkataan 'may' berbanding 'shall', adalah jelas bahawa mahkamah diletakhakkan dengan budi bicara untuk campur tangan. Budi bicara ini mesti dijalankan dengan bijak berpandukan amalan-amalan terbaik di bawah rejim model undang-undang dan tertakluk kepada keperluan-keperluan spesifik di bawah Akta. Di bawah s 37(1)(a)(iv), budi bicara wajar dijalankan hanya jika telah dibuktikan kepada mahkamah di mana perkara tersebut diadukan. Standard adalah atas imbangan kebarangkalian sivil (lihat perenggan 62–63).

(2) Pihak-pihak telah memperincikan pertikaian dan penimbang tara telah menjelaskan isu-isu dengan pihak-pihak. Pertikaian dan isu-isu telah pun dinyatakan. Pernyataan penimbang tara bahawa 'Although the respondent does not dispute the lengths shown in these piling records, it does dispute that hard rock was encountered while boring' adalah peralihan radikal daripada pertikaian yang dikemukakan bagi timbang tara dan percanggahan kedudukan yang diambil oleh defendan seperti yang dicerminkan dalam pliding-pliding. Tiada pada bila-bila masa aspek kuantum, iaitu, kuantiti atau ukuran batu keras yang digali, merupakan satu isu atau pertikaian antara pihak-pihak (lihat perenggan 73–75).

(3) Keputusan penimbangtara untuk menolak tuntutan plaintif kerana plaintif gagal membuktikan ukuran batu keras tersebut atau sebaliknya yang 'consists of rock with uniaxial compressive strength values in excess of 50MPa'; menjadikan award sebagai satu yang diputuskan dengan pertikaian yang bukan sahaja dipertimbangkan oleh pihak-pihak. Keputusan penimbang tara, adalah bertentangan dan memerlukan campur tangan mahkamah (lihat perenggan 79–81).

(4) Seksyen 42 membenarkan rujukan kepada mahkamah hanya bagi persoalan undang-undang. Dalam berurusan dengan permohonan-permohonan seperti ini, persoalan undang-undang yang dirangkakan mestilah berbangkit daripada award itu sendiri dan bukan daripada timbang tara atau prosiding timbang tara. Persoalan-persoalan sedemikian mestilah persoalan undang-undang dan bukan fakta (lihat perenggan 93).

(5) Penimbang tara kekal sebagai satu-satunya pemutus fakta dan walaupun dapatan dan pemakaian prinsip undang-undang mereka mungkin salah, mahkamah tidak akan campur tangan selagi dapatan dan keputusan

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

tersebut tidak bertentangan. Di mana ia bertentangan atau tidak disokong undang-undang, mahkamah tidak boleh membiarkannya dengan alasan campur tangan minimum mahkamah (lihat perenggan 94).]

Notes

For cases on setting aside, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1833–1909.

Cases referred to

CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] 4 SLR 305, CA (folld)

Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd [2008] 3 CLJ 791, CA (refd)

Fiona Trust and Holding Corp v Privalov [2008] 1 Lloyd's Rep 254, HL (refd)

Georgas SA v Trammo Gas Ltd, The Beleares [1993] 1 Lloyd's Rep 215, CA (refd)

Government of India, The v Cairn Energy India Pty Ltd & Ors [2014] 9 MLJ 149, HC (refd)

London and North Western and Great-Western Joint Rly Companies v Billington [1899] AC 79, HL (refd)

PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR 597, CA (folld)

PT Prima International Development v Kempinski Hotels SA and other appeals [2012] SGCA 35, CA (refd)

Rederij Lalemant v Transportes Generales Navigacion SA, The Maria Lemos [1986] 1 Lloyd's Rep 45, QBD (refd)

Sui Southern Gas Co Ltd v Habibullah Costal Power Co (Pte) Ltd [2010] 3 SLR 1, HC (folld)

Universal Petroleum Co Ltd v Handels-und Transportgesellschaft mbH [1987] 1 WLR 1178, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 37, 37(1), (1)(a)(iv), (2)(b), 37(3), 42

International Arbitration Act 2002 (Cap 143A) [SG] s 19B, First Schedule, articles 34(2), 34(2)(a)(iii), (2)(b)(ii)

S Selvarajah (James Lopez with him) (Fernandez and Selvarajah) for the plaintiff.
Rafidah Aziz (Fatin Azimah with her) (Attorney General's Chambers) for the defendant.

Mary Lim J:

[1] The plaintiff is invoking the court's jurisdiction under sub-para 37(1)(a)(iv), para 37(2)(b) and sub-s 37(3) of the Arbitration Act 2005 ('Act

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

646') to set aside certain paragraphs of the final award dated 24 October 2012; namely paras 117–118, 120–125, 139 and 140. Alternatively, the plaintiff seeks to set aside that final award, be it in whole or in part or to vary the same pursuant to s 42 of Act 646. Under s 42, the plaintiff identified several questions of law for the court's determination, the details of which will be examined later.

THE PLAINTIFF'S CLAIM

[2] By letter of intent dated 5 February 2003, the defendant had offered to the plaintiff a tender for a project known as 'Cadangan Pembinaan Kompleks KDN/KA & LOGISTIK, Bukit Aman, Wilayah Persekutuan' direct negotiations based on a 'design and build' arrangement. The plaintiff successfully tendered for the works and after negotiations the defendant accepted the plaintiff's offer vide letter of acceptance dated 1 September 2005. The consideration for the execution of the works was RM320m.

[3] A formal agreement was then drawn up between the parties with the plaintiff as the contractor for the design, construction, completion and maintenance of the Kompleks KDN/KA & LOGISTIK, Bukit Aman, Wilayah Persekutuan. These works involved piling works for the proposed office tower and multi-purpose hall but the hall was subsequently omitted from the works.

[4] The description and the rates of the piling works (provisional) are contained in Section No 2 of Appendix 5 of Part 5 (Vol I of III) which is the contract sum analysis of the contract document. However, these rates only involved all soils, excluding hard rock.

[5] In the course of carrying out piling works, the plaintiff encountered hard material and rock layer. While it continued with the piling works, additional soil investigation and an expert's report (GE Exploration Sdn Bhd) which confirmed the presence of hard material/rock was procured. The defendant was informed of this and copies of the soil investigation report and the report on the 'Classification and Strength Determination of Rock in Bored Pile Holes, Bukit Aman, KL' prepared by the plaintiff's expert were given to the defendant.

[6] On 3 August 2006, the plaintiff completed the piling works. On 27 September 2006, it submitted a claim for additional costs for excavation through hard material/rock over and above the normal drilling in soil which additional costs amounted to RM4,052,756.

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

[7] By letter dated 18 July 2007, the defendant rejected the claim taking the position that the plaintiff itself was responsible for these extra costs. The plaintiff appealed. On 15 July 2010, the defendant's claims committee dismissed the appeal on the ground that the claim for additional costs is not in line with the conditions in the contract document (*tidak sejajar dengan syarat-syarat kontrak*).

[8] Being displeased with the defendant's decision, the plaintiff invoked cl 56 of the conditions of contract. The dispute was then referred to arbitration with the single arbitrator appointed by the Director of the Kuala Lumpur Regional Centre for Arbitration.

[9] Procedural directions were given by the arbitrator after a preliminary meeting with the parties together with their counsel. The plaintiff filed its statement of claim to which the defendant filed its defence followed by the plaintiff's reply. The substance of the plaintiff's claim can be found at paras 7–8 of the statement of claim:

> 7. The description and the rates of the piling works (provisional) are contained in Section 2 of Appendix 5 of Part 5 (Volume I of III) which is the Contract Sum Analysis of the Contract Document. The rates for the drilling works only involve all soils excluding hard rock which means that the rates mentioned in the Contract Sum Analysis does not apply to drilling works through hard material/rock.
>
> 8. In the course of carrying out the piling works, the Claimant encountered hard material and rock layer. The Claimant continued with the piling works and at the same time carried out additional soil investigation and obtained an expert's report from G.E.M. Exploration Sdn Bhd which confirmed the presence of hard material/rock. The Claimant subsequently informed the Respondent the presence of hard material/rock and also submitted to the Respondent copies of the soil investigation reports and the report on the 'Classification and Strength Determination of Rock is Bored Pile Holes, Bukit Aman, KL' prepared by the Claimant's expert. The Respondent did not raise any dispute as to the presence of the hard material or rock.

[10] These particular paragraphs were responded to by the defendant at paras 8 and 9 of its defence:

> 8. Refer to paragraph 7 of the Claim, the Respondent agrees that the description of works and rates for piling works does not include drilling works through hard material/rock.
>
> 9. With regard to paragraph 8 of the Claim, the Respondent had received copies of soil investigations and a report namely 'Classification of Rock in Bored Pile Holes, Bukit Aman, KL' done by G.E.M. Exploration Sdn Bhd dated July 2006.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

> The Respondent does not dispute as to the presence of hard material or rock. However, the Respondent avers that the design for the pile to use bore pile at the average driven length of 25 meters was based on soil investigation carried out by Claimant which revealed that out of 7 boreholes at the depth of 30 to 50 meters only one borehole encountered rock at the depth of 51 meters. Under sub clause 2.2 Condition of Contract, the Contractor (Claimant) shall be fully responsible for the design and guarantee the Government (Respondent) of any fault to the design. Further, the Respondent states that any variations to the design which resulted in extra cost, the Claimant is not entitled to claim as provided under sub clauses 27.3 and 27.4 Condition of Contract.
>
> (refer to appendix E – letter dated 10 May 2006).

[11] Paragraphs 8 and 9 of the defence were amended on 8 September 2011 to read:

> 8. Refer to paragraph 7 of the Claim, the Respondent agrees that the description of works and rates for piling works does not include drilling works through hard ~~material~~/rock.
>
> 9. With regard to paragraph 8 of the Claim, the Respondent had received ...
>
> The Respondent does not dispute as to the presence of hard material ~~or rock~~ ...

THE ARBITRAL PROCEEDINGS

[12] Witnesses including expert witnesses were called and documents were produced during the arbitral proceedings. In addition to oral testimonies, witness statements had also been filed and exchanged. The hearing was conducted over six days. The plaintiff called three witnesses, Mr Heinko Dona Madon ('HDM-C'), Mr Tan King Lim ('TKL-C') and Encik Amirullah bin Harun ('ABH-C'). ABH-C gave his opinion on the rates to be applied for boring through rock vide letter dated 22 September 2011; and this was complied in a bundle marked 'C2'. ABH-C's witness statement was filed on 30 September 2011. The respondent called two witnesses, Ir Rozita bt Yahya ('RBY-R') and Ir Selvanayagam a/p P Nagalingam ('SPN-R').

[13] On the first day of hearing, 4 October 2011, the defendant applied to bifurcate the proceedings, seeking that the issue of liability be decided first and the matter of quantum be dealt with later. According to the award, this was after the defendant had 'stated that it had been served late with Bundle C2 and as such needed time to seek instructions'. According to the award, bundle C2 was 'relevant to the quantum only'. This was objected to by the plaintiff.

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

[14] After hearing the parties, the learned arbitrator dismissed the application 'as it was made very late. In addition, since the pleadings show that the rates to be applied for the work done was disputed the Respondent should have been ready with its position on the rates. However, to be fair, I had directed that the Respondent file its expert witness statement in reply to the witness statement of ABH-C being the claimant's expert witness by 18.10.2011 and that ABH-C could be examined on 27.10.2011 at the earliest. This, in effect, would give the Respondent time to take instructions on bundle C-2 being ABH-C's opinion and respond'.

[15] To accommodate the free dates of the witnesses and for expediency, the parties agreed that the evidence of the respective experts be taken at the end; after all other testimonies had been dealt with. This meant that the defendant would proceed to call its witnesses without requiring the plaintiff to first close its case. Since the parties were comfortable with that arrangement, the learned arbitrator 'ruled that this procedure would be followed'.

[16] On the last day (15 December 2011) and after the defendant had closed its case, the learned arbitrator invited the parties to comment on what he had identified as four main issues (para 52 of the award). He, however, made it clear that the parties were not restricted from changing these issues or raising further issues. After a short break, the parties reverted stating that the issues were 'generally acceptable but both parties reserved their rights'.

[17] These were the issues identified by the learned arbitrator:

(a) what is 'hard rock' for the purposes of the contract?

(b) was hard rock encountered during the bored piling works?

(c) if yes, whether extra-over payment is due for boring through hard rock? and

(d) if yes, at what rate? ('rock boring rate issue').

[18] Directions were then given on the submissions to be filed. Those submissions 'should include submissions on costs both in terms of liability and quantum. Claims for disbursements should be supported by receipts or other suitable documentary evidence. Any challenge to this documentary evidence must be raised in the written replies'.

[19] From the plaintiff's written submissions, the learned arbitrator found that the plaintiff had agreed with the issues that he had put forward. As for the defendant, he found that the defendant had restated the issues as:

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

71.2.1 Whether the Claimant is entitled to claim for extra over under the Contract?

71.2.2 If yes, whether hard rock encountered during piling works.

71.2.3 If yes, at what rate?

[20] Before rendering his award, the learned arbitrator sought clarifications on two occasions.

[21] First, by letter dated 20 June2012, the learned arbitrator requested submissions/ clarifications on two matters. The first concerned the operation of the contra proferentum rule, whether this rule was relevant to any of the issues in the arbitration and how it is relevant as the case may be. The second matter concerned the position of certain missing items in the bill of quantities ('BQ') from the contract. The learned arbitrator found that Items E and F were absent from the contract and he directed the parties 'to submit on whether this was relevant to any of the issues in the arbitration and to explain how it is relevant or irrelevant as the case may be'. Parties were given time to respond.

[22] The second occasion was on 10 October 2012. The learned arbitrator referred to a specific statement found at p 25 of a document entitled 'Field Description of Soil and Rock Guidelines for the filed classification and description of soil and rock for engineering purposes by the NZ Geotechnical Society Inc December 2012'. This document was in one of the bundles used during the arbitration proceedings. The statement read:

> Commonly, rocks with qu values in excess of 50MPa are informally referred to as 'hard' rocks and those less that 20MPa (especially < 10MPa) as 'soft' rocks.

[23] In relation to this statement, he invited submissions on the following and these are set out at para 57 of the final award:

> If we were to assume (and this is yet to be decided) that hard rock consists of rocks with qu values in excess of 50MPa, please submit on the following issues:
>
> 57.2.1 Whether it is possible to ascertain from the evidence the lengths of hard rock that has been bored in respect of 600 mm and 1500 mm diameter piles?
>
> 57.2.2 If yes, how many meters of hard rock have been bored in respect of 600 mm and 1500 mm diameter piles?

[24] The parties were given time to file and exchange written submissions by 17 October 2012. On 24 October 2012, the learned arbitrator rendered his final award. This is the critical part of his award:

> L. Summary of Findings

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

138 Based on what has been discussed above, I have made, inter-alia, the following findings:

138.1 Based on an interpretation of the Contract especially having regard to Section 2, the Claimant is entitled to claim extra over claims in respect of boring through hard rock during piling works.

138.2 The Claimant is entitled to extra over claims for boring through hard rock at the rate of RM1.091.00 per metre for 600mm diameter bored pile and RM2,929.00 per metre for 1500mm diameter bored pile.

138.3 For the purposes of Section 2 of the Contract, the word 'hard rock' refers to rock with uniaxial compressive strength values in excess of 50MPa.

138.4 Hard rock was indeed encountered during piling works.

138.5 However, extra-over payment is NOT due for boring through hard rock as the Claimant has failed to prove the quantum of hard rock that was bored during piling works. It is not possible to tell from the piling records the length of hard rock that was bored as these records do not distinguish between hard rock and other rock with uniaxial compressive strength values below 50MPa.

139 In the final analysis, the Claimant has proved its claim in terms of liability in the sense that it has established that it is entitled to be paid for extra over costs for boring through hard rock and that hard rock was in fact encountered during piling works. Further, the reasonable rate to be paid for this item of work has also been established. But the Claimant has failed in terms of quantum in that it has not proved how much hard rock had been bored during the piling works.

140 Under the circumstances, I am constrained to dismiss the Claimant's claim.

[25] And, that was precisely what the learned arbitrator proceeded to do; he dismissed the claim with costs. Being dissatisfied, the plaintiff has challenged the award under ss 37 and 42 of Act 646. There is no cross-reference or complaint from the defendant on the above findings.

SUBMISSIONS OF THE PLAINTIFF

[26] The challenge to the final award is from two perspectives. First, in relation to matters of jurisdiction under s 37 of Act 646. Second, by posing six questions of law under s 42 of the same Act.

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

[27] The plaintiff traced the material events of the arbitral proceedings in support of its contention that the award dealt with a dispute which was not contemplated by or falling within the terms of submission to arbitration; starting with the issues in the arbitral proceedings.

[28] It was the plaintiff's submissions that although the defendant had 'restated the issues', that restatement did not introduce an additional issue in Item 71.2.1 for decision of the learned arbitrator. The three issues identified or formulated by the defendant were in fact 'identical to issues 69.3, 69.2 and 69.4 respectively as formulated by the Arbitrator'. The plaintiff claimed that there was nothing in either formulation to put the plaintiff 'on notice or to alert the Plaintiff/Claimant that the length or quantity of hard rock would be made an issue'.

[29] The plaintiff proceeded to examine how each of the issues was resolved by the learned arbitrator. In relation to the issue of what is 'hard rock' for the purposes of the contract, the learned arbitrator specifically found at para 98 of the award:

> I have considered the evidence on this issue and I hold that for the purposes of Section 2 of the Contract, the word 'hard rock' refers to rock with qu or unconfined uniaxial compressive strength values in excess of 50 MPa in accordance with NZGS Document.

[30] The NZGS document (New Zealand Geotechnical Society Inc December 2005) was Appendix 9.2 to a document entitled 'Method Statement for the Determination of Hard Material Layer and Rock Layer' and it was submitted by the plaintiff.

[31] Following this finding, the learned arbitrator categorically concluded that hard rock was indeed encountered during bored pile works:

> 108 As I have made a determination, based on the NZGS Document that hard rock for the purposes of Section 2 of the Contract consists of rock with uniaxial compressive strength in excess of 50 MPa, I therefore hold that hard rock was in fact encountered during bored piling works at the Project by the Claimant.

[32] In answer to the next question on the rate that was payable in respect of boring through hard rock, this is what the learned arbitrator found:

> 126 As stated above, the Parties have come to an agreement that the rate for boring through hard rock is no longer in contention. In this connection the 'extra over' rates stated in the answer to question 11 in HBH-R's witness statement and the agreed rates are RM1,091.00/metre for the 600 mm diameter bored pile and RM2,929.00/metre for the 1500 mm bored pile.

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

[33] In other words, both the plaintiff and the defendant had agreed that the rates would be at RM1,091/metre for the 600mm diameter bored pile; and RM2,929/metre for the 1500mm bored pile.

[34] Earlier, at paras 99.4–102, the plaintiff's protests on the defendant's change of position from one of no distinction between 'rock' and 'hard rock' to one where there was a distinction between these two terms, was rejected. These were his reasons:

> 101 However, the Respondent's position from the start is that extra over claims are not payable, period. It is not that it is payable if it is hard rock but not for other kinds of rock. In view of that, the distinction between the different types of rock is irrelevant from the Respondent's point of view since it had taken the position that extra over claims will not be entertained irrespective of the type of rock encountered.
>
> 102 In view of that it was not necessary, from the Respondent's point of view, to make the distinction between different types of rock they cannot be faulted for not doing so. In view of this, I am of the view that the Respondent on the facts of this case is not prevented from taking this position.

[35] Moving next to the issue as to 'whether the Claimant is entitled to claim for extra over under the Contract' or whether extra-over payment was due for boring through hard rock, this is covered at paras 75–85. At para75, the learned arbitrator set out the defendant's contention:

> 75.1 Based on a proper interpretation of the Contract, no extra over payment is due for boring through hard rock since it was not provided in the BQ.
>
> 75.2 Further, the original design of the piling works was varied and it was this variation which resulted in the extra over claim. Since this variation was made pursuant to clauses 27.3 and 27.4 of the Conditions of Contract for reasons of suitability, functionality and safety, such extra over costs are to be borne by the Claimant.

[36] In short, the defendant's argument is that 'the rates in Section 2 apply to boring through all material'. The learned arbitrator disagreed. In relation to the first point, the learned arbitrator said that:

> 76 ... although it is true that no rate was expressly provided in the Contract for boring through rock, it must be borne in mind that the Contract must be interpreted as a whole. Where this is concerned, Section 2 of the Contract provides for the following rates:

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

Bore 600mm Diameter vertical holes including drilling in all soils (*excluding hard rock*) and temporary casings and linings	RM86.90/metre
Ditto 1500mm Diameter ditto	RM322.96/metre

(Emphasis added.)

[37] It was the learned arbitrator's view and findings at para 78 that the defendant's contentions and construction of the rates in s 2 was '… not what the Contract says. It is clear that those rates apply to all soils only and not for anything else'. According to the learned arbitrator:

> 79 Boring through hard rock is obviously more difficult and therefore more expensive. Bearing in mind that the rates in Section 2 are not to apply to hard rock by way of an express exclusion it must have been intended that a different rate would apply in respect of boring through hard rock. Since that rate had not been provided for, it would be implied that a reasonable market rate should apply and that will be the subject matter of the Rock Boring Rate. It may be different if the words 'excluding hard rock' was absent from Section 2. But those words show a clear intention that some other rate would apply to hard rock.

[38] It was also the view of the learned arbitrator that:

> 77 By using the words 'excluding hard rock' it is clear that the intention of the Parties was that the application of the rate of RM86.907metre and RM322.96/metre for 600mm and 1500mm diameter boring work respectively is limited to boring through 'all soils' only and it specifically excluded 'hard rock' for which this rate was not apply. It cannot mean that boring through hard rock would be performed for free.

[39] The second contention of the defendant on why no extra over was due was because the variation of the design was pursuant to cll 27.3–27.4. Under these provisions, extra-over costs for variations which are brought about for reasons of suitability, functionality and safety, are borne by the plaintiff. In this case the variation was necessitated due to safety reasons.

[40] However, upon examination of the evidence, the learned arbitrator noted that cl 27.3 only applies if the ('PD') or the project director is of the opinion that a variation to the design is necessary for the purpose of, inter alia, the safety of the works. The learned arbitrator found that the relevant letter relied on by the defendant for this purpose was not signed by the PD. Instead, it was signed by SPN-R, who was the director of Cawangan Pakar dan Kejuruteraan Awam. SPN-R was not the project director. He found that

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

SPN-R was not amongst the persons identified as the PD's representative who may be said to be deputed or authorised to perform the PD's duties. That being so, the learned arbitrator was 'of the view that clauses 27.3 and 27.4 cannot be applied'.

[41] He also found the defendant's conduct to be inconsistent with the stand taken. According to the learned arbitrator, '... to be consistent, the Respondent should not pay anything beyond the piled length of 25m ... However the Respondent did in fact pay for this 'extra' 7m but at the lower rate provided for in Section 2 of the Contract and this in itself is inconsistent with the Respondent's stand'.

[42] This led the learned arbitrator to conclude on these two defences at para 85:

> For the reasons stated, the 2 defences above raised by the Respondent cannot be sustained. Subject to what is stated in this Award, I would hold that the Claimant is entitled to claim for extra-over under the Contract.

[43] After answering the above four issues, the learned arbitrator went on to say:

> 117 Having established that the rates in Section 2 do not apply to hard rock for which a different rated is applicable, Claimant must go on to show the quantity of hard rock that was encountered.
>
> 118 In order to succeed the Claimant must prove both liability and quantum, apart from showing what rate of payment should be applied for hard rock (which is discussed below), the Claimant must also prove the quantity or length of hard rock that was bored. It is here that the Claimant faces a problem.
>
> 119 The Claimant makes its claim based on 1,077m of bored length in respect of 1500mm piles and 134m of bored length in respect of 600mm piles. These lengths are obtained from piling records that have been produced in evidence. Although the Respondent does not dispute the lengths shown in these piling records, it does dispute that hard rock was encountered while boring.
>
> 120 Claimant is entitled to claim extra-over costs in respect of boring through hard rock. However hard rock consists of rock with uniaxial compressive strength values in excess of 50 MPs and therefore Claimant, in order to succeed has to show the length of such rock that has been bored.
>
> 121 In view of this I cannot on the evidence find out how much hard rock was bored in terms of length or otherwise during bored piling works. In this regard the piling record only refer to rock or weathered rock when this was encountered during piling works and it is not possible

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

to tell from these records how much hard rock i.e. rock with uniaxial compressive strength values in excess of 50 MPa was bored. Since the burden of proof lies with the Claimant to show this, I hold that for this reason the Claimant's substantive claim fails.

125 The claimant is obliged to prove not only liability but quantum in respect of quantum, I hold that the Claimant has failed to show how many meters had been bored in respect of hard rock.

[44] According to the plaintiff, there was nothing to put the plaintiff 'on notice or to alert the Plaintiff/Claimant that the length or quantity of hard rock would be an issue. There was therefore no dispute contemplated with regard to the quantity/length of piling for which extra-over claim is payable. The only dispute contemplated with regard to quantum was the applicable rated for something other than all soils'.

[45] It is the plaintiff's submissions that it was open to the defendant to dispute the length or quantity of hard rock. Even as late as the second day of hearing and later, during clarifications, the defendant had not and did not dispute the length or quantity of hard rock. The only dispute maintained by the defendant concerned the rate at which the extra-over was to be calculated; and this was apparent from para 33 of the final award:

33.2.1 that they agreed on the quantities claimed solely in the sense that the piling records accurately reflect the depth of the piles.

33.2.2 however, the Defendant/Respondent contends that the contract does not allow any extra-over for any type of rock.

33.2.3 alternatively, if the Tribunal holds that extra over claims are allowed, and therefore the claim for hard rock is claimable, then the rate is disputed and to be decided.

[46] Since the defendant did not dispute the length or quantity of hard rock; and in fact the contrary was the position adopted and maintained by the defendant, there was nothing to warn the plaintiff of a dispute in this respect. And, it may be added that the defendant in fact paid according to the lengths that were recorded in the piling records.

[47] Insofar as the matter of quantum was concerned, the only bone of contention with the defendant was whether the contract allowed extra over claims for hard rock; and if so, what was the rate. When the rate was subsequently agreed, the only point of dispute left was on the issue of entitlement to extra over under the contract.

[48] The plaintiff claimed to have protested when the learned arbitrator had asked for evidence on the length of hard rock, contending that it would

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

'tantamount to requiring the Claimant to prove its case on a point that was not pleaded by the Respondent'. In its response then to the clarifications sought, the plaintiff had also submitted that there was no distinction in the industry between the different categories of rock for the purpose of extra over payment. It was not a practice nor was it even practical to determine the qu value of every bit of rock bored through at the time of piling works. Had the learned Arbitrator or the defendant indicated early in the proceedings that the plaintiff was to provide evidence on the qu value of the rock, the plaintiff submitted that it would have at the very least obtain expert evidence to volunteer an estimate of the amount of rock with the requisite qu value or to explain that such evidence could not be found.

[49] The plaintiff's complaint is that after finding all four issues in its favour, the learned arbitrator was not at liberty to reject the claim on a basis that was never relied on by the defendant; and to which the plaintiff never really had a chance to address. To make a further distinction between 'hard rock' and 'rock' was also something that was not within the contemplation of the parties at any time. It is in this sense that the plaintiff say that the learned arbitrator had 'clearly decided on a dispute which was not contemplated by or not falling within the terms of the submission to arbitration'.

[50] It was further submitted that since the issue of the length of rock with qu value in excess of 50MPa was raised by the learned arbitrator himself long after the hearing had been concluded and just prior to the issue of the final award, the plaintiff was not afforded reasonable opportunity to address the same. With this, the plaintiff submitted that there has been a lack of fair play and a failure to act fairly on the part of the learned arbitrator. The fundamental rules of natural justice have therefore been violated in making the award. Such a violation is said to be in conflict with the public policy of Malaysia. To find that the plaintiff had encountered hard rock and was entitled to be paid at the hard rock rate, and then totally deny the plaintiff its claim and further award costs against the plaintiff on the ground that there was no evidence on the length of hard rock that was bored is said to be 'repugnant to one's sense of justice or fairness'. Under such circumstances, the relevant parts of the award must be set aside.

[51] For substantially the same reasons, the plaintiff posed six questions of law which show that the construction given by the learned arbitrator was one which was 'commercially absurd and self-contradictory and this constitutes an error of law' for which the court must intervene to set aside.

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

SUBMISSIONS OF THE DEFENDANT

[52] The substance of the defendant's submissions lies in the requirements of sub-s 37(1) of Act 646. It is the defendant's submission that the plaintiff must provide 'proof' that the award deals with a dispute not contemplated by or not falling within the terms of submission to arbitration. It is only upon provision of the necessary proof that the award may be set aside. In this case, learned federal counsel for the defendant contended that the plaintiff had failed to provide any proof of the grounds relied on by the plaintiff.

[53] Learned federal counsel submitted that the plaintiff was obliged to prove both liability and quantum in order to succeed in its claim. By looking at the issues that were posed either by the learned arbitrator or by the defendant, the defendant contended that the quantity or length of hard rock was 'something which is within the contemplation and falls within the terms of submission to arbitration'; and the learned arbitrator 'had correctly decided that quantity or length of hard rock was an issue to be determined in relation to quantum'. In order to prove its claim amounting to RM4,052,756 the plaintiff must prove not only the applicable rates but prove the presence and quantity of hard rock that had been bored. This is in line with the principle 'he who alleges must prove'.

[54] As for the allegation of breach of natural justice, the defendant submitted that the plaintiff was 'afforded the chance to prove its case through its witnesses as well as written submissions and clarifications'. That being so, there cannot be any breach of the rules of natural justice in which case, the application must fail.

[55] In relation to the challenge under s 42, the defendant submitted that the court had a rather limited jurisdiction to intervene. The lack of appraisal of the law and the evidence are not per se good grounds for setting aside or remitting for reconsideration by the arbitrator. There must be a serious failure to analyse and appraise material and relevant evidence before the court intervenes. The error of law must also be patent and obvious so as to render the award manifestly unlawful and unconscionable to subsist and thereby justify the award being set aside.

[56] It was the submission of the defendant that the questions were correctly decided by the learned arbitrator and that the questions identified by in plaintiff fact relate to the arbitrator's assessment of evidence and/or factual findings which are beyond the scrutiny of the court.

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

[57] Again, for substantially the same reasons, the defendant submitted that the plaintiff had failed to prove quantity of hard rock. The plaintiff's burden of proof was said to have never shifted to the defendant throughout the arbitration proceedings.

DETERMINATION OF THE COURT

[58] This application is made pursuant to sub-para 37(1)(a)(iv), para 37(2)(b) and sub-s 37(3) of Act 646. These provisions read as follow:

> 37(1) An award may be set aside by the High Court only if –
>
> (a) the party making the application provides proof that –
>
> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
>
> (v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or
>
> (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or
>
> (b) the High Court finds that –
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
>
> (ii) the award is in conflict with the public policy of Malaysia.
>
> (2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where –
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred –
>
> (i) during the arbitral proceedings; or
>
> (ii) in connection with the making of the award.

JOBNAME: No Job Name PAGE: 20 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only part of the award which contains decisions on matters not submitted to arbitration may be set aside.

[59] As I had opined in the case of *The Government of India v Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149; s 37 and more particularly, sub-para 37(1)(a)(iv) and para 37(2)(b)(ii) relied on here by the plaintiff is modeled after article 34(2) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration or UNCITRAL Model Law of 1985 ('Model Law'). In fact, much of the Arbitration Act 2005 is so modeled. In that same decision, I quoted the writers, Redfern & Hunter on *International Arbitration* (5th Ed), Oxford University Press) pp 594–617 who had organised the grounds of challenge under article 34 into three broad categories: that which relate to the adjudicability of the claim as determined by the arbitral tribunal; procedural grounds; and substantive grounds.

[60] Generally, 'adjudicability' relates to matters of jurisdiction by reason of incapacity or invalidity; excess of powers or arbitrability of the subject matter of the dispute. On the other hand, challenges on procedural grounds concerned a lack of due process or 'deficiencies in the way the arbitral tribunal was appointed, or the arbitral procedure was conducted'. Lastly, challenges on substantive grounds deal with complaints of mistakes of fact, mistakes of law and public policy but this is where the writers had cautioned:

... there is seldom room for any form of appeal from an arbitral award, on the law or on the facts, or for any judicial review of the award on its merits. If the tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award – good, bad or indifferent – is final and binding on the parties.

[61] Then, there is another ground of challenge which is actually a challenge on jurisdiction of the arbitral tribunal which these same writers in Alan Redfern & Martin Hunter on *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) para 9–26 p 416 described as:

The third ground for recourse against an arbitral award under the Model Law turns on issues of jurisdiction ...

... This third ground of challenge under the Model Law contemplates a situation in which an award has been made by a tribunal that did have jurisdiction to deal with the dispute, but which exceeded its powers by dealing with matters that had not been submitted to it. By way of example, the *Cour d'appel de Paris* has found that a tribunal exceeded its mission by awarding a party damages in an amount that significantly exceeded the damages claimed.

[62] From the terms of sub-s 37(1) which uses the word 'may' as opposed to the word 'shall', it is evident that the court is vested with discretion to intervene. This discretion must be exercised judiciously guided by best

JOBNAME: No Job Name PAGE: 21 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

practices under the Model Law regime and subject to any specific requirements of the Act. Under sub-para 37(1)(a)(iv), the discretion ought to be exercised only if it is proved to the court the matters complained of.

[63] Since the plaintiff here is relying on sub-para 37(1)(a)(iv), the plaintiff has to provide proof or evidence that the learned arbitrator has rendered an award which 'deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration'; or the award 'is in conflict with the public policy of Malaysia'. This requirement of proof means that relevant and adequate evidence must be furnished. The standard is however, on a civil balance of probabilities.

[64] When determining this application, the court is mindful of the principle of minimum intervention in matters concerning arbitration as provided in s 8 of Act 646. This must not be misconstrued as an abdication of the basic and fundamental role of the courts in matters of justice. On the contrary, this principle reflects the courts' support for arbitration and respect for party autonomy when it comes to resolutions of disputes between warring contractual parties. At the end of the day, the court is merely enforcing those agreed contractual obligations which are binding on the parties and which include provisions on resolutions of disputes.

[65] This approach has been consistently adopted and there is a line of authorities on this. In this regard, several decisions from across the causeway are of assistance. First, the Singapore Court of Appeal's decision in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597. The case concerned an application to set aside an arbitral award under s 19B First Schedule art 34(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed). Those grounds are substantially similar to s 37 relied on here.

[66] The Court of Appeal upheld the decision of the High Court which had dismissed the application. In so doing, the Court of Appeal at p 614 adopted Lord Halsbury's observations in *London and North Western and Great-Western Joint Rly Companies v Billington* [1899] AC 79 at p 81 on this matter of jurisdiction:

> I do not think any lawyer could reasonably contend that, when parties are referring differences to arbitration, under whatever authority that reference is made, you could for the first time introduce *a new difference after the order of arbitration was made.* Therefore, upon that question I certainly do give a very strong opinion. (Emphasis added.)

[67] The Court of Appeal also relied on the decision of *Rederij Lalemant v Transportes Generales Navigacion SA, The Maria Lemos* [1986] 1 Lloyd's Rep 45 where in answer to the question as to whether the arbitration tribunal had

JOBNAME: No Job Name PAGE: 22 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

jurisdiction to hear a dispute about discharging port demurrage, the court had held that 'the jurisdiction that any arbitral tribunal could exercise was that bestowed by the parties and that the scope would depend on the terms in which the parties had defined it. To this end, the court examined the correspondence between the parties to ascertain their intention when appointing the arbitrator'. The court of Appeal observed that the court in that case had examined the correspondence between the parties to ascertain their intention when appointing the arbitrator:

> ... The court found at 47, as follows:
>
> > The question, therefore, as it seems to me, is this: whether the appointment on Jan 3 and 4 gave the arbitrators jurisdiction to determine not only what has been generally agreed called loading port demurrage but also, prospectively, to determine the quantum of discharging port demurrage, in so far as discharging port demurrage would flow from a finding by the arbitrators that the charterers were in breach before the vessel left the loading port. It seems to me that on any proper construction of the telex messages (which stated that the arbitration extended to all disputes under the charter) to which I have referred, it must follow that the parties were giving the arbitrators jurisdiction to that extent.
>
> The correspondence showed that they had intended the arbitration to extend to all disputes under the charter.

[68] A second decision, also from the Singapore Court of Appeal is that of *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at p 319. Here, too, the Court of Appeal was discussing the approach to be adopted when dealing with challenges under article 34(2)(a)(iii) of the International Arbitration Act of Singapore. The Court of Appeal reminded that in dealing with applications to set aside an award, the court 'is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it'.

[69] Then, there is the High Court decision of *Sui Southern Gas Co Ltd v Habibullah Costal Power Co (Pte) Ltd* [2010] 3 SLR 1. Here, the court was asked to intervene under article 34(2)(a)(iii) and 34(2)(b)(ii) of the First Schedule to the International Arbitration Act (Cap 143A, 2002 Rev Ed) of Singapore and set aside an award made in the defendant's favour. The court declined. The High Court examined the Court of Appeal in *PT Asuransi* and made the following conclusions on the appropriate test when dealing with applications to set aside arbitration awards. The court was to ascertain firstly 'the matters which were within the scope of submission to the arbitral tribunals'; before secondly ascertaining 'whether the arbitral award (or the part being impugned) involved such matters, or whether it was a 'new difference'

JOBNAME: No Job Name PAGE: 23 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

which would have been 'irrelevant to the issues requiring determination' by the arbitral tribunal'.

[70] However, the court is compelled to intervene in this particular case for reasons which will soon become apparent. This is despite the general proposition that arbitration clauses are to be given a wide construction with the courts striving to carry into effect the terms of the contract. Indeed, the matter of quantum in the sense as understood by the learned arbitrator can fall within the terms of the arbitration agreement and the submission of arbitration as found in cl 56 of the contract:

> 56 Arbitration
>
> 56.1 If any dispute or difference shall arise between the Government and the Contractor, either during the progress or after completion of the Works, or after the determination of the Contractor's employment or breach of this Contract as to:
>
> (a) the construction of this Contract;
>
> (b) any matter or thing of whatsoever nature arising under this Contract;
>
> (c) the withholding by the P.D. of any certificate to which the Contractor may claim to be entitled;
>
> then such dispute or difference shall be referred to the officer named in Appendix 1 for a decision.

[71] As can be seen from the terms of this arbitration clause or arbitration agreement, such terms are expansive enough to encapsulate the aspect considered by the learned arbitrator.

[72] This wide approach was adopted in the oft-cited decision of the House of Lords in *Fiona Trust and Holding Corp v Privalov* [2008] 1 Lloyd's Reports 254 at p 257:

> 13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: 'If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.'

[73] Be that as it may, the peculiar facts of this case do not avail themselves of that construction and conclusion. As mentioned earlier, the court's intervention here is occasioned entirely by the actions and decisions of the parties themselves. In this case, the parties had defined the dispute and the

JOBNAME: No Job Name PAGE: 24 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

learned arbitrator had then clarified the issues with the parties. The dispute and the issues are those already mentioned. In essence, the plaintiff's claim was for additional costs for excavating through hard material/rock over and above the normal drilling in soil. The plaintiff's claim of RM4,052,756 was based on 1,077 meters of bored length in respect of 1500mm piles and 134 meters of bored length in respect of 600 meters piles. These lengths were obtained from the piling records that were produced during the arbitral proceedings.

[74] The learned arbitrator's statement at para 119 of the final award that '… Although the Respondent does not dispute the lengths shown in these piling records, it does dispute that hard rock was encountered while boring'; is actually a radical departure from the dispute that was submitted for arbitration and a contradiction of the position adopted by the defendant as reflected in the pleadings.

[75] At no time was this aspect of quantum, that is, the quantity or length of hard rock that was bored ever an issue or a dispute between the parties. This is evident from the pleadings filed in relation to the arbitration. Although such pleadings should not be approached too narrowly, they are nevertheless relevant as these pleadings serve 'to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication' as was opined by the Court of Appeal in Singapore in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] SGCA 35. In this case, the Singapore Court of Appeal held:

> An arbitration agreement is merely an agreement between parties to submit their disputes for arbitration. The disputes submitted for arbitration determine the scope of the arbitration. It is plain that the scope of an arbitration agreement in the broad sense is not the same as the scope of the submission to arbitration. The former must encompass the latter, but the converse does not necessarily apply, in that particular matters submitted for arbitration may not be all the matters covered by the arbitration agreement. The parties to an arbitration agreement are not obliged to submit whatever disputes they may have for arbitration. Those disputes which they choose to submit for arbitration will demarcate the jurisdiction of the arbitral tribunal in the arbitral proceedings between them. An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. Simply put, a party cannot raise a new dispute in an arbitration without the consent of the other party. These propositions flow inexorably from the consensual nature of arbitration.

[76] At paras 8–9 of the amended defence, the defendant agreed that the description of works and rates for piling works did not include drilling works through hard rock; and that it did not dispute the presence of hard material. The defendant's position was quite unequivocal; it rejected the plaintiff's claim on the basis that according to the terms of the contract, the defendant was not

JOBNAME: No Job Name PAGE: 25 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

liable to pay for such works; and that it was the plaintiff itself who was responsible for such costs. The defendant was unconcerned with the finding of hard material or hard rock as it maintained that it was not liable to pay for any type of rock. This stand was one that the defendant maintained consistently and repeatedly throughout the duration of the contract; throughout the arbitration; and now, before the court in these proceedings.

[77] It is not difficult to see why the defendant would maintain that stand; it was always its understanding that because the contract was a design and build contract, it was not responsible but the plaintiff was. Hence, its reliance on cll 27.3–27.4 of the contract. As a result of that understanding, the defendant was prepared, and in fact, it proceeded to agree that hard material was present; and that no rates for hard rock were provided for in the contract. As far as the defendant was concerned, it was immaterial and it did not matter that the plaintiff bored through hard rock or any type of rock, as submitted by its learned senior federal counsel, because it claimed that it was just not liable to pay for such additional costs under the terms of the contract.

[78] In the course of submissions, the defendant took this understanding and position one step further when it 'agreed on the quantities claimed solely in the sense that the piling records accurately reflect the depth of the piles'. It nevertheless maintained and reiterated its stand that the plaintiff was not entitled to any payment for any extra-over for any type of rock. But, in the event the arbitrator was not with the defendant, it disputed the rate for such additional costs.

[79] I agree with the plaintiff that with this line of defence and of greater significance, the consistent positions taken by the parties, in particular the defendant, the learned arbitrator's decision to reject the plaintiff's claim because the plaintiff had failed to prove the length or otherwise of hard rock which 'consists of rock with uniaxial compressive strength values in excess of 50MPa'; renders the final award one which dealt with a dispute which was not only not contemplated by or not falling within the terms of submission to arbitration; but was never in the contemplation of the parties to start with.

[80] This becomes more obvious when it is appreciated that the defendant had in effect paid the plaintiff for the piling depths claimed by the plaintiff. That payment was made without any concern or protest on the length or depth of hard rock piled or bored through. The defendant accepted the records as found in the piling records. The defendant just refused to pay at any other rate except that which was provided in the BQ and which was for 'all soils' as it was clear in its mind that it was the plaintiff who had to bear it all.

JOBNAME: No Job Name PAGE: 26 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

[81] The learned arbitrator disagreed with the defendant on this interpretation of the contract; especially on the provisions in the BQ and on cl 27. As far as the award is concerned, the issue of liability to pay for boring through hard rock was one rendered in the plaintiff's favour and there is no cross-reference by the defendant on this or at all. The defendant was quite contented to accept the award in totality. Under such circumstances, the decision of the learned arbitrator, with respect is almost perverse and requires intervention of the court.

[82] From the facts and circumstances in this arbitration, it was quite apparent that the final award involved a 'new difference or such matters which would have been irrelevant to the issues requiring determination' by the learned arbitrator. The 'new difference' being the matter of length or quantity of hard rock which was irrelevant to the issue of entitlement to the extra-over claims because there was no dispute on this as seen from the documentation and conduct of the parties, especially the defendant.

[83] The submissions of the parties, again, of the defendant, are also insightful and they support the above conclusions. From the submissions, it is quite obvious that the matter of the quantum as understood by the learned arbitrator was not of concern at all to the parties; especially to the defendant. This is what the defendant submitted at paras 70–72. After dealing with the issues of the 'Concept in a Design & Build Contract' at paras 25–27; 'Whether the Claimant is entitled to claim for extra over under the Contract' at paras 28–43; 'Whether hard rock was encountered during piling works' at paras 44–69; the defendant dealt with the issue of 'If yes, what is the rate?' at paras 70–76.

[84] In the submissions on this last issue, the defendant made no reference or issue that there was no proof of lengths or quantities in the arbitration. This is what the defendant submitted at paras 70–76:

> Issue III. If yes, at what rate?
>
> 70. Since the above issues are answered with no, there is no need to discuss on this as the applicable rate is the rate for drilling in all soils as provided in the BQ and the Claimant had been paid accordingly under the Contract. The liability of the parties shall be ascertained first. However the Respondent was directed to submit on this issue as the tribunal had decided during the hearing for parties to argue both on liability and quantum.
>
> 71. On this issue the Respondent had called RW4, Sr Husnan bin Hussin Ketua Penolong Pengarah Unit Khidmat Kos (Ketua Unit Khidmat Kos), Bahagian Perolehan dan Khidmat Kos in JKR headquarters for his expert opinion on the rates for boring through rock. The Respondent avers that should the Arbitral Tribunal decide in favour of the Claimant, it is submitted that the applicable rate is as follows:

JOBNAME: No Job Name PAGE: 27 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

i RM1,091.00 for extra over 600 mm bored pile

ii RM2,929.00 for extra over 1500 mm bored pile (refer to RWS4)

72. The Respondent further submits that the evidences of RW4 were not challenged by the Claimant and the rates have been agreed by the Claimant during the trial.

73. However, the Respondent further argues that the additional costs applicable for a minimum of 0.5 meter per pile socketing into the rock only. This is due to the fact that according to good engineering practice, once hard rock is encountered, the pile should be socketed into the rock for 0.5 m depth only. There is no need to bore up to the full length as the Claimant had alleged that rock was encountered. In this case the Claimant had not changed its design parameter which was parameter for drilling in soil when they alleged that hard rock had been encountered. This was not in accordance with the accepted engineering practice.

74. The Respondent submits that if hard rock was really encountered, on engineering practice, the Claimant should have changed the design parameters for drilling through soil to design parameter for drilling through rock. There is no necessity to drill through hard rock based on allegation that end bearing was not considered. The Claimant should not expect the Respondent being made liable to pay the Claimant due to the failure of the Claimant to change its design when the Claimant had actually encountered rock.

75. Therefore if the arbitral tribunal decides that hard rock was actually encountered, the amount payable to the Claimant is only RM242,212.50 and not RM4,502,756.00 as claimed by the Claimant. The calculation is provided as follows:

For extra over 600mm bored pile: 22m x RM1,091.00 = RM24,002.00

For extra over 1500mm bored pile: 74.5m x RM2,929.00 = RM218,210.50

76. The Respondent further submits that the Claimant had not proven its rate as there was no proof as to the quotations on how the Claimant had arrived at the rate submitted, merely comparing the rate used by the Claimant with the rate used in another project for the same diameter of bored pile is not enough to establish the amount claimed by the Claimant was actually incurred. There is no proof that additional payment had been made to the piling sub-contractor and the piling sub-contractor's testimony was not provided. The arbitral tribunal shall consider that the Claimant's claim from the Respondent is the additional costs for extra over which the Claimant alleged that the Claimant had incurred. However there is no evidence to support this allegation. Is the amount actually incurred? The answer remains in doubt.

[85] These submissions were responded to by the plaintiff who reiterated its submissions on being entitled to such extra over costs. As for the rates, in its

JOBNAME: No Job Name PAGE: 28 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

reply, the plaintiff agreed with the defendant's rates – see para 140 of the 'Claimant's Reply to Respondent's Written Submissions'.

[86] From the terms of the award it is apparent that the quantity, length or amount of hard rock bored by the plaintiff was never an issue of concern between the contracting parties. While the parties may have agreed to the four issues identified by the learned arbitrator with reservations of their rights, there was no submission or address by the parties on a fifth issue; the fifth issue being one concerned with the quantity of hard rock found. The amount, length or quantity of hard rock was furthest from the parties' minds; in other words, it was not an issue at all between them. The parties' conduct is testimony of that. Most important, the defendant had already paid for those lengths, but it had paid on grounds and at rates that the plaintiff disputed.

[87] The lengths or quantity of hard rock that the parties were dealing with is reflected in the plaintiff's claim and letter to the defendant dated 27 September 2006. In that letter, the plaintiff identified a quantity of 1077 meters for boring through rock for 1500mm diameter pile; and extra over of 134 meters for 600mm diameter pile. At that time it had asked for rates of RM3,630 and RM1,069 respectively. It was now prepared to accept RW4's rates.

[88] Like the plaintiff, the defendant submitted that it was not possible to ascertain the length of hard rock that had been bored. The defendant's reasons may differ somewhat from the plaintiff's but it still remains that the parties agreed that the length of hard rock could not be ascertained.

[89] I therefore quite agree with the plaintiff that those particular paragraphs of the final award must be set aside. This '5th issue' arose only when the learned arbitrator sought clarifications and this was long after conclusions of hearing. It was a 'new difference' which was irrelevant to the determination of the dispute and it was not even a disputed matter between the parties. The plaintiff had protested against this and its reasons are valid and sound.

[90] On this ground alone, the court will set intervene to set aside the relevant paragraphs of the final award. In such circumstances, there is no need for the court to examine whether the other ground relied on by the plaintiff has been met; that is that the award is in conflict with the public policy of Malaysia.

[91] The court is therefore satisfied that there is sufficient proof that paras 117–118; 120–125 and 139–140 of the final award ought to be set aside as these paragraphs deal with a dispute on quantum which was not a dispute contemplated by or falling within the terms of submission to arbitration.

JOBNAME: No Job Name PAGE: 29 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

[92] The plaintiff has also launched its challenge under s 42 of Act 646 which reads:

> Reference on questions of law
>
> 42(1) Any party may refer to the High Court any question of law arising out of an award.
>
> (1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

[93] Section 42 allows the reference to court only of questions of law. When dealing with applications of this nature, the questions of law which are framed must arise from the award itself and not from the arbitration or arbitration proceedings – see English Court of Appeal's decision in *Universal Petroleum Co Ltd v Handels-und Transportgesellschaft mbH* [1987] 1 WLR 1178. Such questions must also be questions of law and not of fact. The court must be watchful to prevent attempts at circumventing 'the rule that the tribunal's findings of fact are conclusive or that they constitute a serious irregularity or an excess of jurisdiction, or on the basis that there was insufficient evidence to support the findings in question.' – see *Russell on Arbitration* [1997] para 8-057 after discussing the English Court of Appeal's decision in *Georgas SA v Trammo Gas Ltd, The Beleares* [1993] 1 Lloyd's Rep 215.

[94] However, as found by the Court of Appeal in *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791, there can be intervention when the award is 'manifestly unlawful and unconscionable to subsist and, thereby, justify the award to be set aside'. The court accepts that arbitrators remain the sole determiners of fact and while their findings and their applications of legal principles may be wrong, the court will not intervene so long as such findings and decisions are not perverse. Where it is perverse or not countenanced by law, the court cannot sit back under the excuse of minimum court intervention.

[95] Six purported questions of law have been framed here for consideration. From those six questions and for the same reasons, the court accepts that Questions (v) and (vi) are valid questions of law which are answered in the plaintiff's favour. Those questions being:

> (v) Can the Arbitrator assign a ground for rejection of the Plaintiff's extra over claim for boring through 'hard rock' i.e. failure to prove quantity of hard rock when this ground for rejection was never advanced nor contemplated by the Defendant at the time of rejection of the claim? In seeking to determine this question the plaintiff states that the Arbitrator had committed an error of law in relation to legal principles concerning estoppel in relation to contract.

JOBNAME: No Job Name PAGE: 30 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

(vi) Can an Arbitrator whilst acknowledging and/or accepting that on the issue of quantum, the Defendant only required the issue of dispute rate to be decided upon, thereafter disregard this fact and proceed to determine on his own accord the issue of quantity/length of hard rock, which issue was not raised by the defendant either in the pleadings or in the course of the arbitration. In seeking to determine this question of law, the Plaintiff states that the Arbitrator had committed an error of law in relation to legal principles on pleadings, admissions and the doctrine of estoppel and the rules of natural justice.

[96] For the reasons earlier stated in relation to the setting aside under s 37, because there is no dispute on quantum in that the plaintiff had to prove the length of hard rock bored, the relevant paragraphs of the final award as identified by the plaintiff are indeed 'manifestly unlawful and unconscionable to subsist and, thereby, justify the award to be set aside'. The conclusions reached by the arbitrator are patently and obviously illogical and perverse given that the plaintiff had proved not only was rock but hard rock encountered during the works and that the plaintiff was entitled to extra costs in relation to such encounter; given that the issue of length or quantity was never in dispute between the parties; and given that the defendant had paid for the lengths claimed by the plaintiff, except at rates for 'all soils'. In such cases, intervention is sanctioned and the principles of law here as submitted by both parties are not in dispute.

[97] Accordingly, the learned arbitrator's final award is set aside in those paragraphs and the final award is varied at para 152 to read that the plaintiff's claim is allowed at RM3,300,727 with costs.

[98] In the matter of costs which the learned arbitrator ordered against the plaintiff, this is a matter of discretion so long as there is a basis. It appears that it followed the event. Since the plaintiff's claim was successful but for the last issue, the costs should have been apportioned. However, with the above finding, then the costs should follow the event of the plaintiff being successful in its claim and its application today to set aside those material paragraphs of the award, then it follows that that part of the award must also be varied and it shall be accordingly varied to be borne by the defendant.

[99] In relation to the present proceedings I understand that both parties are not pressing for costs. In which case, I shall make no order on costs here.

JOBNAME: No Job Name PAGE: 31 SESS: 1 OUTPUT: Thu Oct 2 11:48:36 2014

A *Claim allowed with costs.*

Reported by Kanesh Sundrum

B

C

D

E

F

G

H

I